

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

DR DISTRIBUTORS, LLC,) Docket No. 12 C 50324
)
Plaintiff-Counterdefendant,) Rockford, Illinois
) Thursday, May 17, 2018
v.) 1:30 o'clock p.m.
)
21 CENTURY SMOKING, INC.)
and BRENT DUKE,)
)
Defendants-Counterplaintiffs,)
)
CB DISTRIBUTORS, INC. and)
CARLOS BENGUA,)
)
Counterdefendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE IAIN D. JOHNSTON

APPEARANCES:

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MR. ANTHONY J. DAVIS
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ROBERT C. von OHLEN & ASSOCIATES
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MR. TRAVIS W. LIFE

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1 THE CLERK: Calling 12 CV 50324, DR Distributors, LLC
2 vs. 21 Century Smoking, Inc.

3 THE COURT: Good afternoon, counsel. Could I get
4 appearances for the record starting with the Plaintiff,
5 please.

6 MR. DAVIS: Good afternoon, your Honor -- go ahead,
7 Robert.

8 THE COURT: Go ahead, Mr. von Ohlen.

9 MR. von OHLEN: Robert von Ohlen for the Plaintiff.

10 THE COURT: Good afternoon, Mr. von Ohlen.

11 MR. von OHLEN: Good afternoon.

12 MR. DAVIS: And Anthony Davis also for the
13 Plaintiffs, and I'm at my office on speakerphone with two of
14 my colleagues who are assisting me on the case, Brian Moffitt
15 and Alashia Chan.

16 THE COURT: Good afternoon.

17 And for the Defendant?

18 MR. STAMATIS: Peter Stamatis, your Honor, for the
19 Defendants.

20 MR. LEAVENS: Thomas Leavens on behalf of the
21 Defendants.

22 MR. LIFE: Travis Life, L-i-f-e, on behalf of the
23 Defendants.

24 THE COURT: Good afternoon, Mr. Leavens.

25 Good afternoon, Mr. Stamatis.

1 Good afternoon, Mr. Life.

2 Okay. First of all, we are running late because we
3 had a criminal matter that ran long. So I apologize for
4 running late. I thought it would be quicker than it was, and
5 I thought this would be -- when I set this for status, I
6 didn't think it would be easy, but I didn't think it would be
7 what I anticipate it is going to be today.

8 So I know I have various motions before me -- or a
9 motion before me. There is also -- actually, there are two
10 motions before me -- there is three motions, but one is set
11 for next week. Those were entered and continued to allow
12 Mr. Davis and Mr. von Ohlen to take a look at some things, do
13 some investigation, and also the Defendants were going to take
14 a look at the ESI issue, and that's the motion that's set up
15 for the 20 -- well, no, it is not. There is motions set up
16 for the 24th, but I did receive the status report about the
17 ESI and the Yahoo account. I have read that.

18 I don't know if the four banker's boxes of responsive
19 documents have been provided to Mr. von Ohlen and Mr. Davis
20 yet.

21 MR. von OHLEN: They have not.

22 MR. STAMATIS: May I address the court? Peter
23 Stamatis.

24 THE COURT: Okay. Go ahead, Mr. Stamatis.

25 MR. STAMATIS: Thank you, your Honor.

1 So where we left off last, at the last court
2 appearance, we took a hard look to get to the bottom of what
3 had happened, as I advised the court, this is something that
4 happened before my involvement. So it was something that
5 really, at least from my perspective, I needed to look at with
6 counsel to get our arms around what had happened, and to our
7 chagrin, we discovered what had happened, and that's what we
8 set forth in the declarations of Mr. Leavens and Mr. Life for
9 what had happened early in the case with the disclosures and
10 with Ms. Liberman, the attorney, and one thing is for sure,
11 there has been at no time whatsoever any bad faith or any
12 intent to hide any documents or anything like that, okay?
13 That's clear.

14 But the fact of the matter is that because counsel
15 had represented very early in the case, and Mr. Leavens would
16 be happy to address this to your Honor --

17 THE COURT: Could you back up, Mr. Stamatis? You
18 broke up, and I didn't quite hear you. You said counsel had
19 been, and then something. You said something, and you broke
20 up.

21 MR. STAMATIS: Sure, literally sat with Mr. Duke
22 early in the case when he had accessed his e-mails and had
23 produced documents from that, and this is the very first
24 document disclosure.

25 THE COURT: Who said -- Mr. Stamatis, again, I'm

1 sorry, you broke up. Who sat with Mr. Duke?

2 MR. STAMATIS: Mr. Leavens and Ms. Lieberman.

3 THE COURT: Okay. Go ahead.

4 MR. STAMATIS: Early in the case and had obtained
5 documents from that Yahoo, the Brent Duke personal Yahoo
6 e-mail account and produced documents from that account that
7 either referenced that account or that there were screenshots
8 from that account that were in the original document
9 production. They just didn't know the imaging of that hard
10 drive and the other 21 Century hard drives would not pick up
11 that Yahoo account when the hard drives were imaged against
12 the search terms that the Plaintiff's lawyers had provided.

13 So we figured all that out and came to the conclusion
14 that we had to cure it, obviously. So we then retained the
15 same search company to run the search terms against that Yahoo
16 account, and they did, and we have gone through and assembled
17 the responsive documents and finally got them boxed last night
18 into two -- what I would call two and three-quarters banker's
19 boxes that are ready to be produced. All they need to do is
20 to be Bates stamped and be produced. We just wanted to tell
21 your Honor, as we said in our submission to the court, to get
22 your Honor's imprimatur to go ahead and produce those, and
23 then we would do that as very quickly as we could.

24 THE COURT: Why would you need my imprimatur to
25 produce documents that were previously requested in discovery?

1 MR. STAMATIS: It is only because we are, obviously,
2 well past the discovery deadline, and we didn't have them all
3 ready for that last time anyway, your Honor.

4 THE COURT: Okay.

5 MR. STAMATIS: So we wanted to make sure that -- you
6 know, we just wanted to have your Honor's direction or
7 blessing to do it. So we are ready to do it.

8 So in terms of that, we thought, at least moving
9 forward on this, perhaps the thing to do would be to get the
10 documents over to counsel and then to give them time to review
11 those documents, after which we would confer with counsel and
12 then come back to the court at least to report what to do
13 about those documents.

14 At the last court appearance, there was a suggestion
15 to depose Mr. Duke, and in terms of this production, I really
16 would be hard-pressed to say that they should not be able to
17 depose Mr. Duke about these documents and the contents of
18 these documents.

19 So in looking at it, I thought that we could even
20 talk with counsel to see if we can come to some agreement with
21 regard to what that might look like, and then come back and
22 report to the court on that issue.

23 MR. von OHLEN: Does your Honor want to hear from the
24 Plaintiff?

25 THE COURT: I was going to say something or hear from

1 you, but, yes, I would like to hear from you. It is just when
2 I want to hear from you.

3 Go ahead, Mr. Davis or Mr. von Ohlen.

4 MR. von OHLEN: I will let Mr. Davis go first.

5 MR. DAVIS: Thank you, your Honor.

6 As you can imagine, we have taken a look at this
7 newest story that the Defendants have laid before the court.
8 What we see is a new and much bigger problem than was laid
9 before us on March 19th that was the subject of our motion.

10 The last time we were before you, you had given them
11 leave to explain this 120 pages, to explain it with
12 affidavits, to explain the late production of those documents
13 that they produced on the eve of March 19th, when we were
14 filing our last brief, and explain the data loss that they
15 certified and declared in those papers that there was a loss
16 of data, and now we have a new filing with a new story that
17 has more questions than answers.

18 As the court can imagine, when we filed our motion in
19 January raising this issue of withheld documents, and in the
20 last few weeks we looked hard at the discovery, the course of
21 discovery in this case, the response that's in front of the
22 court and the story that they have given, this new story, is
23 inconsistent, is flat-out inconsistent with the history and
24 the true state of affairs in this case.

25 I think what we have now is a problem that raises

1 issues under Rule 37 not only with discovery and
2 noncompliance, but also failure to preserve and failure to
3 comply with the court order, specifically the June 2015 order
4 about producing these e-mails.

5 We have loss of ESI data, spoliation, and the biggest
6 problem I see throughout all this is that the Defendants and
7 counsel knew about it and sat on it, and here we are at this
8 hearing, and they are coming up with thousands of new pages of
9 documents that they never looked at or have some story about
10 now, despite us chasing these e-mails for years in this case,
11 and it is the most simple -- their client is operating out of
12 an apartment with a couple of computers, and it is ESI 101.
13 You grab the e-mails. You search them. They never did that
14 or they did it piecemeal and never preserved it and lost data.

15 So in this latest briefing, they don't even explain
16 the data loss, which you gave them leave to do. They are
17 silent as to that. But what we don't know is what the true
18 state of affairs are. And as we talked about at the last
19 hearing, we need to get to the bottom of that, and what we are
20 proposing is a reasonable roadmap for the court to follow to
21 try to get to the bottom of these potential violations of
22 Rule 37, and we don't even know what we want yet until we know
23 what the problems are.

24 But in terms of getting this production of new
25 documents, we certainly would like to see that, but we want

1 them in a searchable format, not in a box of documents with
2 Bates stamps that we have to spend hours and hours going
3 through. It is now I hear it said four boxes of papers -- I
4 just heard two and a half boxes, but we don't want what they
5 have culled it down to. We want the entire data set. They've
6 got the privilege. Give us the whole thing.

7 At this point, there is no credibility on their side
8 to be believed that they are removing the right documents or
9 producing responsive documents. We want that in native,
10 searchable format, and we want all of it.

11 The other thing we want to do is I think at this
12 point, given the moving stories and the history here, is we
13 need a neutral forensic ESI company to come in, an expert of
14 our choice at their experience, to come in and get the data,
15 get the hard drive, get all of this e-mail data, get their
16 online accounts. Whatever they did, didn't do, or apparently
17 failed to do, failed to preserve, get it, have it forensically
18 held and preserved so it can be properly searched, and outside
19 of their hands so there is some validity to what is happening
20 here, and then we can have this outside forensic person do the
21 searches and do an analysis of the data to find out what was
22 deleted, when it was deleted, how things happened.

23 The other thing we want is we want to review this
24 data. Whatever they give us and whatever is found through the
25 forensic examination, I don't know how much it is, I don't

1 know how much time it will take us to do that, but we will
2 look at it, and then we need an evidentiary hearing to get to
3 the bottom of this. We have got all these conflicting
4 representations, changing stories over the years in the
5 briefing. Your Honor, these were subject to multiple,
6 multiple conversations, e-mails, deficiency letters, discovery
7 demands, motions to compel on new, specific issues about these
8 e-mails that if we didn't raise it in our motion that they
9 withheld it, we wouldn't even be talking about it. They got
10 caught. It is that simple.

11 And they gave us attorney affidavits, not their
12 clients, but the attorneys, with lots of "I think," "I
13 believe," "I understood." We need the real people with the
14 real knowledge here. Brent Duke has to be on the stand in
15 your Honor's courtroom so you can ask your own questions,
16 evaluate his credibility. The same with the vendors that were
17 involved in this. Mr. Leavens, Mr. Life, whoever else was
18 involved in this, we need to get to the bottom of it, and all
19 this has to be done at their expense. We think this is a
20 reasonable roadmap to do a full evaluation of the violations
21 of Rule 37 here under all the circumstances.

22 THE COURT: Mr. von Ohlen, anything to add?

23 MR. von OHLEN: I think that that covers most of it,
24 Judge. I guess what concerned me probably the most was maybe
25 the last thing, is what we got in the briefing by the

1 Defendants were attorney affidavits and a lot of attorney
2 speak, and, you know, fair enough. I mean, we all do it
3 because that's the way we talk. But I think that we and the
4 court might have fairly expected an explanation from the
5 client under oath, under the penalty of perjury.

6 When you have shifting stories and such late-changing
7 stories, and only stories that have been revealed because we
8 brought this up in our motion for summary judgment saying the
9 absence of these documents tells a very compelling story,
10 there is an aha moment, obviously, on the other side to say,
11 "Hey, maybe we should really look for these documents now to
12 dispel the Plaintiff's argument," and they apparently did,
13 they really did a better search because they found, first,
14 122, and now apparently a thousand more documents that are
15 responsive.

16 So at this point, we just can't take the word of
17 Mr. Stamatis, as good as it is generally speaking, that the
18 documents are not relevant or they are not prejudicial. He
19 doesn't get to make that decision. It is the court who gets
20 to make that decision, obviously, after we have the
21 opportunity as part of the adversary process to evaluate
22 whether they are relevant or evaluate whether they are
23 prejudicial.

24 Now, let me say this: Let's say there is nothing
25 that's bad in there, that everything supports their case.

1 Well, we spent years in this case pursuing those documents,
2 pursuing lines of analysis and strategy that we didn't have
3 to. If that is not the definition of prejudice to a party,
4 our client has incurred legal fees associated with going down
5 all those rabbit holes.

6 So even if everything that Mr. Stamatis says is true,
7 it still is, in my view, violations of Rule 37, and the court
8 needs to decide what to do, and I looked at your Honor's very
9 interesting and well-done color coded chart. I know the court
10 has thought about these issues, but there has to be some
11 consequence to causing all of this mess.

12 So that's my two cents.

13 THE COURT: Okay. All right. Mr. Stamatis,
14 Mr. Leavens?

15 MR. LEAVENS: Your Honor, this is Tom Leavens. I
16 just want to respond.

17 First of all, we don't see that there is any shifting
18 story here in terms of any inconsistencies. There were things
19 that we discovered as we learned more about this particular
20 account. I can speak to what happened. It is laid out in my
21 declaration, but essentially it did not occur to us that the
22 Yahoo account needed to be dealt with as a separate matter in
23 the e-discovery that was done. I just don't have the
24 technological background necessarily to make the technical
25 distinction that escapes us here, which is that those e-mails

1 would not be revealed in the search that was done of those
2 four computers.

3 A lot of this is just informed by my own personal
4 experience in e-mail being maintained on the computers.
5 Clearly, there was nothing done that was with any intent. I
6 was in disbelief. I read the motion, the summary judgment
7 motion that was filed by the Plaintiffs, that asserted without
8 any qualification that there existed documents that
9 essentially said that there were instructions given by
10 Mr. Duke to an SEO expert to insert names in the metadata, and
11 those documents were not produced. We had not seen those
12 documents. Certainly, nothing was withheld. I was confused
13 because if those documents existed --

14 THE COURT: Look, I don't want to have the same
15 semantic fight as -- well, the same semantic discussion that
16 was had before. There were documents that were requested and
17 not produced. You can say withheld, you can say you didn't
18 turn them over, but they didn't get them, and they asked for
19 them and they were responsive.

20 MR. LEAVENS: They were not produced, that's correct.
21 I'm giving an explanation for why that happened. We have
22 tried to correct that to try to put the Plaintiffs in a
23 position where they would receive now those documents they
24 would have received if the account had been within the
25 e-discovery that was conducted. There was certainly no bad

1 faith on our part.

2 THE COURT: I can't make that call now. I don't have
3 enough evidence to make that call.

4 MR. STAMATIS: I'm sorry, we can't hear you.

5 THE COURT: I don't have enough evidence to make the
6 call on intent and bad faith.

7 MR. STAMATIS: Okay.

8 THE COURT: Here is what we are going to do: The
9 first problem we have is there are mounds, stacks, boxes of
10 documents, materials relating to an incomplete cross-motion
11 for summary judgment before Judge Kapala which are still in
12 the process of being amended and changed, revised, corrected,
13 whatever verb you want to slap on it. That's all sitting
14 there, and then what I said the last time is I assume
15 everybody wanted to win their motion, and one of the first
16 rules of writing is to make it easy on the reader. Nobody who
17 is going to try to dive into that stack of materials is going
18 to be engaged in an easy process.

19 We have -- meaning me and my staff have -- painful
20 and intricate knowledge of the docket sheet in this case and
21 we have difficulty figuring out what's what. And like I said,
22 that process of briefing the summary judgment isn't even
23 finished at this point, even before the whole ESI thing blew
24 up. If the ESI thing blows up, well, is that going to change
25 what people wrote in their filings for summary judgment?

1 Maybe, maybe not. Likely? Probably.

2 Are we going to have piecemeal briefings for the
3 remainder of the calendar year 2018? It can't happen. It
4 cannot happen. I cannot push all this over to Judge Kapala in
5 this manner and with this kind of time frame.

6 So that being said, I'm going to strike all the
7 summary judgment pleadings to date without prejudice so that
8 the parties, whenever we are done with this process that we
9 are going to talk about in a moment relating to ESI, whenever
10 we are done with that whole process, the parties can draft,
11 compile, and file proper summary judgment motions, statements
12 of fact and memorandum before Judge Kapala so that he doesn't
13 need to wade through the mounds of confusing, conflicting
14 documents that are currently before him. So everybody will be
15 allowed to do that again.

16 The second point, it is not 2004 anymore, it is not
17 even 2009. It is not 2004 with Zubalake. We are at 2018.
18 Zubalake is Z-u-b-a-l-a-k-e. We are in 2018. The Rules of
19 Professional Conduct require counsel to be reasonably
20 competent in ESI and in electronic information. I am baffled
21 as to what I'm being told, how it occurred, because it doesn't
22 make a whole lot of sense to me, but I don't have all the
23 facts again.

24 Having said all of that, again, we are not 2004 or
25 even 2009. We are 2018. Rule 37(e) was amended and amended

1 in large part to streamline the process and to focus on the
2 key issues relating to ESI so that the ESI tail does not wag
3 the litigation dog, so that we don't have a big production
4 with evidentiary hearings and motions and experts if at the
5 end of the process it is not going to make a difference, if
6 there is no prejudice.

7 The problem is we need to go through some of that to
8 figure out what the next step is. The obvious first step to
9 take is that all the documents that have been compiled in
10 these two-and-three-quarter banker boxes need to be produced
11 to the Plaintiff in native format so they can search them.

12 My question for Mr. -- I'm going to guess it is
13 Mr. Leavens, since Mr. Stamatis wasn't on the case at that
14 point, is were clones made of the hard drive? Do we have
15 duplicates that we can provide to a forensic analyst who can
16 then look at the hard drive or wherever the stuff is kept to
17 determine what was on it and when it was on it and if things
18 have been removed, when they were removed, and the simple way
19 to do that is let's just make a copy, make a clone. Now
20 you've got a clone, and it is all captured on there, and we
21 will be able to know that based on the hash values.

22 So, Mr. Leavens, was a clone made?

23 MR. STAMATIS: So, your Honor, this is Peter
24 Stamatis, your Honor.

25 So when the parties engaged in e-discovery, whenever

1 it happened, five years ago, there was the four hard drives
2 from 21 Century Smoking were imaged at that time.

3 THE COURT: Okay.

4 MR. STAMATIS: That image still resides with the
5 forensic company.

6 THE COURT: The vendor. Okay.

7 MR. STAMATIS: I spoke to the gentleman there within
8 the last ten days, and he advised me orally over the telephone
9 that they have it. So --

10 THE COURT: And, Mr. Stamatis, you said that was five
11 years ago?

12 MR. STAMATIS: The image was from five years ago.

13 THE COURT: Okay.

14 MR. STAMATIS: Three years ago. Forgive me, your
15 Honor, three years ago is when the e-discovery was done.

16 So the e-discovery was done in a way that is more
17 akin -- or let me say it this way: I'm used to e-discovery
18 being performed in a manner that is more akin to what
19 Mr. Davis said, and why Mr. Davis and Defense counsel didn't
20 do this originally kind of baffles me a little bit, but what
21 we have done in the past is we agree -- the parties will agree
22 on one forensic company to image the hard drives, and then
23 that one forensic company that the parties agree to then
24 performs the searches of the keywords and then provides the
25 results to everybody.

1 THE COURT: Okay. Let me pause you there, all right,
2 before we keep tumbling down the rabbit hole.

3 If they were imaged three years ago, that takes us to
4 summer of 2015, if I crunch the numbers correctly. This case
5 was filed in 2012.

6 MR. STAMATIS: Well, your Honor --

7 THE COURT: Can I get a word in edgewise, please?

8 Litigation holds should have gone on, at the latest,
9 when this thing was filed, and since there was discussions
10 before litigation, there should have been a litigation hold
11 filed before then. One of the obvious questions I have is why
12 weren't images of the hard drives taken at that point?

13 MR. LIFE: Your Honor, this is Travis Life for
14 Defendants.

15 Your Honor, the e-discovery vendor imaged these
16 computers in December of 2014. That was in the process of
17 discovery after the search terms and vendors were discussed
18 with opposing counsel.

19 THE COURT: Okay. So that gives it a little
20 different time frame. It doesn't change the point as to,
21 okay, you agreed on the search terms, but what happened before
22 December of '14 if they weren't imaged? How do we know things
23 aren't gone?

24 MR. LIFE: Well, the Plaintiff was instructed about
25 not destroying any documents.

1 MR. STAMATIS: Defendant.

2 THE COURT: I assume a litigation hold went out,
3 right?

4 MR. LIFE: I'm sorry, what?

5 THE COURT: A litigation hold was sent?

6 MR. LIFE: We were told -- we did not send a separate
7 letter, but he was told multiple times, and he understood
8 that.

9 THE COURT: How do we know that, one, he didn't
10 intentionally do it? We will find that out. Two, things can
11 be rewritten, lost in all kinds of ways if they are not imaged
12 immediately, like in 2012, when the case was filed, and
13 everybody in 2012 knew ESI was an issue.

14 MR. LEAVENS: They never asked for it.

15 THE COURT: It doesn't matter whether they asked for
16 it in discovery because you are going to assume -- a
17 reasonable attorney in 2012 is going to assume that ESI in a
18 case like this would be at issue.

19 MR. STAMATIS: Your Honor -- the only thing I can
20 say, your Honor -- Peter Stamatis -- is it didn't happen. I
21 don't know that the Plaintiff did that. I know that there
22 were hard drives that were disclosed in the 26(a) disclosures.
23 Going back and looking at those, I didn't see any
24 correspondence or any discussion back and forth about having
25 either side's hard drives imaged at that time.

1 THE COURT: Well, that's a good pivot, and it would
2 be great for politics, but it doesn't work for me in a
3 courtroom.

4 So here is what we are going to do. I want the
5 native format of all those documents produced to the Plaintiff
6 by May 31st. Get that to them. If you have hard copies, and
7 it sounds like you do, and you have already made a copy, send
8 it over to him. It sounds also like you have removed and
9 culled any attorney-client and work product material from
10 there. Is that correct?

11 MR. STAMATIS: Yes, your Honor, and from
12 attorney-client -- is there attorney-client?

13 MR. LEAVENS: I don't recall seeing any in the
14 original, yes.

15 MR. STAMATIS: In the original, and this one, too?

16 And then there were just things that were not
17 responsive or were ancillary. So those were culled out, too.

18 THE COURT: Let me pause you right there because
19 that's going to cause me some concern unless I get some
20 information.

21 If the search terms were used and they caught those
22 documents, why are you saying that they are not relevant and
23 ancillary if they caught the search terms and were produced?

24 MR. STAMATIS: They were documents from a trading
25 account that had nothing to do with this.

1 THE COURT: Well, then how did the search terms catch
2 them, and why shouldn't those be produced to the other side to
3 determine whether or not they are relevant?

4 MR. STAMATIS: One of the search terms was the word
5 "trademark," so that was triggering a lot of things. So you
6 would have TD Ameritrade say, for example, is a registered
7 trademark or something, so that would trigger that. There
8 were other, you know, documents related, off the top of my
9 head, to the Mercantile Exchange or one of the exchanges that
10 had a trademark. There were some e-mails from Mr. Duke's
11 mother. There were some e-mails that were strictly on a
12 personal level between Mr. Duke and Mrs. Duke.

13 THE COURT: And what search term would have caught
14 that?

15 MR. STAMATIS: You know, I would have to go back and
16 look, but there were some that clearly had nothing to do with
17 anything other than domestic matters between the two.

18 So that's what we -- you know, that's what we did. I
19 mean, if your Honor orders it, we will put it all back
20 together and they can have it all. That's fine. But at least
21 in the past, we did I think what was consistent with what had
22 been done in the past.

23 THE COURT: In what past? In what past? When you
24 say "in the past," what do you mean by that?

25 MR. STAMATIS: In this case, your Honor, in that only

1 relevant documents -- or discoverable documents, rather, were
2 produced. So, you know, if your Honor wants us to produce it
3 all, obviously we will.

4 THE COURT: Well, look, I don't make the call at this
5 point whether they are relevant. I'm just a little confused
6 as to how agreed search terms were used, documents were
7 captured using those search terms, and then they are withheld.
8 If you are saying you have done an independent investigation,
9 reviewed every single one of those, and are making
10 representations to the court that none of those things are
11 relevant, okay. And if the Plaintiff wants to knock
12 themselves out and look at e-mail correspondence between
13 Mr. Duke and Mrs. Duke and waste their time on that, well, if
14 they want to do that, you can produce it to them.

15 Mr. von Ohlen, Mr. Davis, do you want to look at
16 those documents?

17 MR. von OHLEN: I think at this point, Judge, I think
18 we just have to be prophylactic. It is not that I'm really
19 interested in what Mr. Duke and Mrs. Duke have to say, but at
20 this point I'm past the point of just accepting
21 representations that things are relevant and irrelevant.

22 THE COURT: Okay. So put those back into the pool.
23 So that needs to be done by May 31st. Get that done.

24 I will give the Plaintiff some time to review those
25 materials, and then we will talk about the next step because

1 that will be the first step because I think we have all
2 discussed it, and I think Mr. von Ohlen used the same term
3 that I have used in the reported decisions, "no harm, no
4 foul." I don't know that at this point. You have got to let
5 the Plaintiff take a look at those documents and determine
6 what's in them, and maybe this is a big issue that turns out
7 to be completely irrelevant. It ends with a bang -- not with
8 a bang, but with a whimper, but I need to give them the
9 opportunity to look at those materials.

10 So if they get them by the 31st, I'm thinking -- one,
11 two, three -- I can talk to you on -- that's a terrible day.
12 I can talk to you on June 26th in the afternoon or I can talk
13 to you -- we can go into July. I could talk to you on
14 July 10th at, say, 2:30.

15 MR. von OHLEN: Your Honor, this is Mr. von Ohlen.
16 May I be heard briefly?

17 THE COURT: I'm sorry, who is that?

18 MR. von OHLEN: This is Mr. von Ohlen. May I be
19 heard briefly?

20 THE COURT: Mr. von Ohlen, yes.

21 MR. von OHLEN: If the court would consider, and
22 either one of those dates is fine, although I would prefer the
23 earlier date to kind of get this moving --

24 THE COURT: Okay.

25 MR. von OHLEN: -- is what I have heard today is that

1 snapshots were taken in December 2014 of hard drives and that
2 there was no written litigation hold. Again, now we are
3 relying on memory in a case that's a 2012 case.

4 So we have representations now to the court that you
5 can work with to say what we need to have is what should have
6 been done, which is preservation at the very least as of the
7 filing date, and the only way we are ever going to know is not
8 by looking at these documents and coming back to the court and
9 saying, "No harm, no foul," or, "Yes, there is a foul, and
10 here's what it is." The only way we are going to know the
11 answers to those questions is to have an independent ESI
12 expert come in, go back as far as they can to the filing date,
13 and there were discussions, frankly, prior to the filing date
14 that should have put people on notice, and they had the
15 benefit of the representation of counsel even at that point to
16 get what there is to get.

17 That provides the prophylactic, this is what was
18 there, or maybe it is unrecoverable. I don't know. There is
19 three or four different e-mail services. There is apparently
20 three or four hard drives. I'm fine with our own expert, an
21 independent expert, a court-appointed expert, but somebody,
22 while we are going through these documents, should be
23 performing that function in order that we can look at that and
24 then come back to the court and say, "Here's what's next."

25 THE COURT: Okay. And I understand your argument,

1 Mr. von Ohlen, but I need to apply the proportionality
2 principles, and that's an expensive, time-consuming process
3 that I'm pretty confident you are going to say that Mr. Duke
4 is going to have to pay for and Mr. Duke is going to scream
5 about paying for that.

6 So I want to take this in steps and figure out, if
7 you look at those documents, we will have a better sense of
8 what has now been captured, and if there are problems or
9 issues raised, then the next step would possibly be appointing
10 a forensic analyst to obtain the images, which apparently were
11 taken December '14, and do an analysis and figure out what was
12 on the system when, whether anything was removed and how,
13 whether anything that's been removed can be recoverable, if it
14 can be recovered, at what cost, and if it can be recoverable,
15 who would pay for that cost and whether that cost would be
16 reasonable.

17 But to keep things moving forward, the parties will
18 be ordered to provide me a list of three potential ESI
19 vendors, whether you would call it a vendor, forensic analyst,
20 computer expert, whatever label you want to put on, give me
21 three, each side give me three. I will take a look at those.
22 I'm not saying I will pick somebody off the list. I have
23 people in my own head, but I think some of them might be
24 conflicted out because they are local. I know somebody who
25 probably wouldn't be conflicted out, he is fantastic, but he

1 is going to cost you people a pretty penny because he is
2 fantastic, and then we will see how things shake out after the
3 review of the native materials, and if we need to go down that
4 road, we will at least be further down that road on the 31st
5 once I get the lists and I can compare the lists, okay?

6 So submit those --

7 MR. von OHLEN: When would you like that list?

8 THE COURT: By the 31st. And just send them to
9 chambers, only to chambers, so you guys don't fight over who
10 provides the list or whether you do it simultaneous. Just
11 send them to chambers and I will take a look at the lists.
12 Provide at least three. Each side will provide three.

13 MR. DAVIS: Your Honor, this is Mr. Davis. Can I
14 just ask a point of clarification?

15 THE COURT: Sure.

16 MR. DAVIS: When you are talking about the production
17 of the native data, and the Defendants are talking about the
18 hard drives they imaged, will this production include the
19 newly discovered ESI, I guess? They have surely imaged now
20 whatever these e-mail accounts are that they never looked at
21 before, and I want to make sure that all that native data is
22 produced on the 31st, not just the old stuff, but everything.
23 Is that what your Honor is ordering?

24 THE COURT: I will say what my mom used to tell me,
25 "I'm confused by your confusion," which probably means I made

1 it confusing. My intent was these -- what was it? I'm trying
2 to find the number. It was four banker's boxes, then it
3 became two-and-three-quarters banker's boxes, and for some
4 reason I have in my head like 4,000 documents or 2,000
5 documents. Whatever those are that are in the banker's boxes,
6 those need to be produced by the 31st in native format.

7 MR. DAVIS: Thank you, your Honor.

8 MR. von OHLEN: Meaning a searchable format, your
9 Honor, correct?

10 THE COURT: Yes. If it is in native format, you can
11 search it.

12 MR. STAMATIS: All right. So we will produce, your
13 Honor -- Peter Stamatis talking.

14 So I understand, so we are going to produce by the
15 end of the month the native search results -- or the native
16 search results of the four discovery forensics on this Yahoo
17 e-mail account by the 31st?

18 MR. LEAVENS: With the search terms that were
19 disclosed earlier.

20 MR. STAMATIS: Yes, with the search results, right?

21 THE COURT: Right, right. I assume that's how you
22 got the documents is you ran the search. You ran the search
23 terms and that's what you caught.

24 MR. STAMATIS: Correct. We will produce that by the
25 end of the month.

1 THE COURT: All right. And it is in native format,
2 but make sure that native format is searchable. It should be.

3 MR. STAMATIS: Yes, your Honor.

4 THE COURT: Okay.

5 MR. LEAVENS: Thank you.

6 MR. von OHLEN: And, your Honor, did you also order
7 that they immediately produce the written documents that they
8 have?

9 THE COURT: Yes, yes. They are going to give you the
10 hard copies, too. They have already got them copied and in
11 boxes. I guess they are going to Bates stamp them. You get
12 the hard copies, too.

13 MR. STAMATIS: Okay. We will produce those. We
14 don't have the copies run off, your Honor, but if you are
15 ordering us to run off a copy to them and Bates stamp them, we
16 will do that and get it to Mr. von Ohlen's office or he can
17 pick them up or whatever he wants.

18 THE COURT: Get them to him by the 31st, okay?

19 MR. STAMATIS: Okay.

20 THE COURT: So, Mr. Stamatis, does the 10th work for
21 you -- or, wait, you were looking at the earlier date. What
22 did I say, the 26th? The 26th at 2:00 o'clock.

23 MR. STAMATIS: Yes, your Honor.

24 THE COURT: Okay. Provide Ms. Pedroza with your
25 contact information and we will place the call.

1 Thank you, counsel.

2 MR. STAMATIS: All right. Very well. Thank you,
3 your Honor.

4 MR. DAVIS: Your Honor, your Honor --

5 THE COURT: Yes.

6 MR. von OHLEN: Mr. von Ohlen.

7 Just as a housekeeping matter, the Defendants filed a
8 motion to make certain amendments which is set for presentment
9 Tuesday.

10 THE COURT: Yes, that's stricken.

11 MR. von OHLEN: Could your Honor strike that and give
12 us a certain amount of time to file a response brief?

13 THE COURT: Well, it is stricken because all the
14 summary judgment briefings, as I said, they are all gone.
15 They are all gone. Everything is gone. Everything is
16 stricken without prejudice. You have a mess before Judge
17 Kapala. The mess is probably going to get worse before it
18 gets better. We have to figure out the ESI issues, okay?

19 MR. STAMATIS: All right.

20 MR. von OHLEN: One more housekeeping then. The
21 motion -- our motion to provisionally seal certain documents,
22 which we don't want to win, is also pending before the court.
23 Is that stricken as well?

24 THE COURT: Everything is stricken. Everything
25 related to summary judgment is stricken.

1 MR. STAMATIS: If I may respond, this is Peter
2 Stamatis, your Honor. We responded to that because we thought
3 there were some documents that ought to be not in the record.
4 They are confidential. They had customer names and addresses,
5 and right now they have been, as I understand, provisionally
6 sealed. Can we just hold it as it is?

7 THE COURT: Sure, although if they have been -- have
8 they been sitting on a public filing available for everybody
9 to view for the last couple of months?

10 MR. DAVIS: Yes.

11 MR. STAMATIS: I understood those were pulled back by
12 counsel for the Plaintiff.

13 THE COURT: That was their motion. That's their
14 motion to do that. That was the motion they don't want to
15 win. So they have been sitting there. They have been sitting
16 there for all the world to see.

17 MR. STAMATIS: Well, let me address that. My
18 understanding was in my conversation -- so much has happened
19 since then. I believe it was with Mr. Davis.

20 THE COURT: You can say that again.

21 MR. STAMATIS: My understanding is they were just
22 being pulled back and then we would fight about it later
23 because they should never have been filed given the protective
24 order that was in place because all of these had been marked
25 confidential. So the agreement was that they would just be

1 pulled back and then we would just figure out where we are at.

2 THE COURT: Well, here is my order again: Everything
3 is stricken. So after we strike everything in the next day or
4 two, if you want to go on the system and dig around and see if
5 there is documents that you think are covered by a protective
6 order that you think should be sealed, knock yourself out and
7 file another motion, and we will take a look at it.

8 MR. STAMATIS: Very well.

9 MR. von OHLEN: Thank you, Judge.

10 THE COURT: Have a good day, your Honor.
11 (Which were all the proceedings heard.)

12 CERTIFICATE

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter.

15 */s/ Heather M. Perkins-Reiva*

June 6, 2018

16 _____
17 Heather M. Perkins-Reiva
18 Official Court Reporter

Date